IN THE

Supreme Court of the United States

October Term, 1970

No. 325

LOUIS A. NEGRE,

Appellant,

against

STANLEY R. LARSEN, *et al.*,

Appellees.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* BY THE NATIONAL COUNCIL OF THE CHURCHES OF CHRIST IN THE U. S. A. JOINED IN BY EIGHT OF THOSE CHURCHES:

The American Baptist Convention,
The Christian Church (Disciples of Christ),
The Church of the Brethren,
The Episcopal Church,
The Lutheran Church in America,
The Reformed Church in America,
The United Church of Christ and
The United Presbyterian Church in the U.S.A.

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The parties have consented in writing to the filing of this brief.

The Amici are all religious bodies, whose interest in this case arises from their concern for the free exercise of religion and the protection of the rights of conscience under the civil law of the United States.

The National Council of Churches

The National Council of the Churches of Christ in the USA is a membership corporation incorporated in 1950 under the Membership Corporations Law of New York. It is the cooperative agency of thirty-three Protestant and Orthodox religious denominations with an aggregate membership of 42,500,000 throughout the United States. By its certificate of incorporation it is committed "to promote the application of the law of Christ in every relation of life."

The General Board of the National Council of Churches, which is its governing body, composed of delegates designated by the member denominations, adopted a policy statement on February 23, 1967, which includes the following pertinent passages:

> "Although society has the power to press all its members into military duty, our nation has made room in its conscription laws for the operation of conscience by exempting certain classes of conscientious objectors from military service.
>
> "The General Board of National Council of Churches considers this provision to be wise public policy, not only because intensely objecting men do not make the best soldiers, but because society should encourage men to live by conscience rather than compel them to violate it. The war-crimes trials at the conclusion of the Second World War asserted the ines-

capable responsibility which every human being bears for his own acts, even in obedience to military orders in time of war * * *

"The highest interests of a free society are served by giving to conscience the greatest freedom consonant with justice, public order and safety * * * Coercion of conscience can recruit no more than an unwilling body, while mind and spirit and a willing body are likely to serve society more fully in alternative tasks not repugnant to conscience. Therefore we urge the greatest possible respect for conscience and the greatest possible protection for its free exercise.

"In respect to the provisions for conscience in the selective service laws, we recommend the following:

(1) The retention of the provision of noncombatant military service for those conscientiously opposed to full military service, and the retention of the provision for alternative civilian service for those who are conscientiously opposed to participation in war in any form.

(2) The extension of precisely the same provisions for those who are conscientiously opposed to a particular war, declared or undeclared, that is, to the one which a young person confronts at the time of induction."

It is in furtherance of the above directive that the National Council of Churches offers this brief in the instant case.

Although the National Council of Churches serves the interests of the several denominations which comprise it, they are autonomous religious bodies in their own right, and operate independently of the National Council of

Churches. Several of the member denominations of the National Council of Churches have policies similar to that of the National Council, and take this opportunity to speak jointly with the National Council of Churches as friends of the court in this case.

The American Baptist Convention

The American Baptist Convention is a national religious body of more than 6,000 Baptist congregations comprising approximately 1,500,000 adherents. In May, 1966, the American Baptist Convention adopted a resolution containing the following language:

> "We call upon our nation to respect the conscience of those who believe with integrity that either a particular war or all wars are morally unjustifiable, and who, therefore, refuse to serve in our armed forces."

The Christian Church (Disciples of Christ)

The Christian Church (Disciples of Christ) is an international religious body having 7,964 churches in the United States, comprising 1,883,263 members.

In October, 1968, The Assembly approved a resolution "Concerning Rights and Responsibilities of Conscience Regarding Participation in War," which includes the following:

> "* * * acknowledging that different persons will interpret the facts of a historical situation as viewed under the criteria of the just war theory in different ways, so that one might believe a war is just and another might believe it is unjust; we urge that our

young men be sensitive to the promptings of God's spirit, to weigh their decisions as Christian men, and to accept responsibility to be either conscientious participants or conscientious objectors to the particular war in which their service is requested. * * *

"* * * we urge the United States government to provide legal status and recourse for the conscientious objector to a particular war as is provided for the conscientious objector to all wars in forms of alternative service to one's country."

The Church of the Brethren

The Church of the Brethren is a national religious body of 1,054 churches, comprising a membership of 187,957. It is one of the historic "peace churches" whose members have traditionally been exempted from conscription because of their absolute pacifism.

Section 2 of the statement of the Church of the Brethren on War, as revised by the 1970 Annual Conference, declares:

"The official position of the Church of the Brethren is that all war is sin and that we seek the right of conscientious objection to all war. We seek no special privilege from our government. What we seek for ourselves we seek for all—the right of individual conscience. We affirm that this conscientious objection may include all wars, declared or undeclared; particular wars; and particular forms of warfare. We also affirm that conscientious objection may be based on grounds more inclusive than institutional religion."

The Episcopal Church

The Episcopal Church is a national religious body of 7,137 churches, comprising 3,373,890 members.

On October 24, 1968, the House of Bishops, which, as "the Fathers in God of the Church speaks corporately to the church the mind of its Chief Pastors," adopted the following resolution pertaining to conscientious objection:

> "WHEREAS, the Lambeth Conference by resolution held that 'it is the concern of the Church to uphold and extend the right of conscientious objection,' and the Lambeth Report on the Renewal of the Church in Faith recognized 'anew the vital contribution to the Christian Church made by many of those who in conscience cannot participate in any war or in particular conflicts;' and
>
> WHEREAS, the General Convention of 1967, by resolution, called upon the Church 'to provide counsel * * * to those members of our Church who have problems of conscience with regard to the prospect of the military draft * * *,' and
>
> WHEREAS, other national and international Christian bodies have affirmed the right of selective conscientious objection,
>
> THEREFORE be it resolved that we Bishops recognize the right of man to object, on grounds of conscience, provided he has made every effort to know all of the relevant factors involved, to participation in a particular war, even though he may not embrace a position of pacifism in relation to all war, and urge our government to enshrine such a right in the laws pertaining to Selective Service."

The Lutheran Church in America

The Lutheran Church in America embraces a constituency in both the United States and Canada. Its congregations number 5,852 with an inclusive membership of 3,149,234.

In June 1968, The Biennial Convention of the church declared:

> "Lutheran teaching, while rejecting conscientious objection as ethically normative, requires that ethical decisions in political matters be made in the context of the competing claims of peace, justice, and freedom. Consequently, a man need not be opposed to participating in all forms of violent conflict in order to be considered a bona fide conscientious objector. * * *
>
> [The church] stands by and upholds those of its members who conscientiously object to military service as well as those who in conscience choose to serve in the military. This church further affirms that the individual who, for reasons of conscience, objects to participation in a particular war is acting in harmony with Lutheran teaching * * *
>
> [C]onscientious objectors to particular wars, as well as conscientious objectors to all wars, ought to be granted exemption from military duty and opportunity should be provided them for alternative service."

This position of the church is a direct outgrowth of the classical Christian tradition as reflected in the writings of St. Augustine, Martin Luther, and the Augsburg Confession [Article XVI]:

> "Christians are obliged to be subject to civil authority and obey its commands and laws in all that

can be done without sin. But when commands of the civil authority cannot be obeyed without sin, we must obey God rather than man [Acts 5:29]."

The Reformed Church in America

The Reformed Church in America is a national religious body of 939 churches, comprising 230,519 members.

This church passed the following resolution:

"Request the churches to extend love and concern to all men, including those who, for reason of conscience, are not opposed to all war, but who, accepting the legal penalties, will not serve in a specific war because of their beliefs."

The United Church of Christ

The United Church of Christ is a national religious body of 6,866 churches, comprising 2,032,648 members.

The General Synod of the United Church of Christ in June 1967 adopted the following resolution:

"Be it Resolved that the General Synod of the United Church of Christ recognize the right of conscientious objection to participation in a particular war or in war waged under particular circumstances, as well as the right of conscientious objection to participation in war as such."

The United Presbyterian Church in the U.S.A.

The United Presbyterian Church in the U.S.A. is a national religious body of 8,667 churches, comprising 3,172,760 members.

In 1969, the 181st General Assembly of the church adopted an extensive statement on the church's teaching regarding "War, Peace and Conscience", which included the following policy:

> "God is the Lord of conscience, not only of a participant in war for moral reasons, or of the objector to all war on pacifist grounds, but also of those who conclude that a particular conflict is morally unconscionable and indefensible. * * * the church has a responsibility to urge the state to respect the conscientiously held scruples of those who oppose a particular war."

The same General Assembly, seeking to implement this teaching, recommended that the churches request the U. S. Department of Defense

> "to establish procedures for considering requests within the Armed Forces for reassignment to noncombatant duties or for discharge for conscientious objection to a particular war, when the objections grow either out of experience prior to entering military service, but which do not become fixed until after such entry, or from a development of conscience which has occurred since entering military service."

Questions Presented

In a memorandum dated April 1969, and filed in this Court in opposition to Negre's petition for a writ of mandate, the Solicitor General said (pp. 5 and 6):

> "Petitioner argues that his religious beliefs are sincere—a characterization we do not dispute. * * * As we read all the opinions in this case, petitioner's religious sincerity was not at issue; rather, the Army—as well as the district court—found that petitioner's religious belief, despite his sincerity, was directed at the war in Vietnam, and that war alone."

The Solicitor General's concession is fully consistent with the following finding of the Army Hearing Officer (R. 37):

> "The roots of [Negre's] beliefs are religious. The real question in this case is what are those beliefs. It is not that the beliefs are not based on religious grounds."

Hence no issue of fact is presented. The issues of law to which this brief is directed are:

> (1) Was Louis A. Negre entitled to a discharge from the Army, or, in the alternative, transfer to a bona fide non-combatant assignment in the United States as a conscientious objector under Section 6(j) of the Universal Military Training and Service Act properly interpreted and applied to the facts of this case? Our answer is: Yes.
>
> (2) If, however, the answer must be No, then was Negre nevertheless entitled to identical treatment by reason of constitutional rights? Our answer is: Yes.

POINT ONE

Louis A. Negre was entitled to a discharge from the Army or, in the alternative, transfer to a bona fide non-combatant assignment in the United States as a conscientious objector under Section 6(j) of the Universal Military Training and Service Act. 50 U.S.C. App. 456(j).

I

Section 6(j) reads:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reasons of religious training and belief, is conscientiously opposed to participation in war in any form. As used in this subsection, the term 'religious training and belief' does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

According to Negre's application for discharge from the Army as a conscientious objector, he is a Roman Catholic by religious training and belief, and was educated through high school in Roman Catholic institutions of learning. In his own words (R. 10, 12, 13):

> "I * * * accept as part of my religious training and belief the Catholic teaching that I must examine and form my conscience upon the best information I can gather. * * * Equally, I accept my religious training and belief that where my conscience is certain, I must obey the order of conscience. * * *
>
> "I am obligated by my conscience, under my religious training and belief, to refuse participation in any form in the war in Veitnam. * * *

> "My family came to America in search of peace, and in search of freedom of conscience. I believe that the American law and constitution do allow freedom of religion and of conscience."

Negre could not, on the basis of his religious belief, claim exemption as a conscientious objector prior to his application for discharge from the Army. His Roman Catholic training compelled no such action until he had an opportunity to examine the factual situation pertaining to the war in Vietnam, to draw a conclusory opinion, on the basis of his training and conscience, as to the justness of that war, and until he was faced with the imminent prospect of direct, personal participation in that war alone. There was "no realistic opportunity" to challenge his classification before receiving orders to report for combat duty in Vietnam. *Cf. United States* v. *Sisson,* 297 F. Supp. 902, 906 (appeal dismissed 38 U.S.L.W. 4616).

Hence, a primary question to which this brief is directed is whether or not the Army was right in deciding that Negre did not qualify for discharge as a conscientious objector because he objected to the war in Vietnam specifically, and because he admitted to the Hearing Officer that he would consider service, in a non-combatant capacity, in the event of a hypothetical attack on the United States at a hypothetical future time.

No such hypothetical limitation on the right of exemption is expressed in Section 6(j); and no such hypothetical limitation can rationally be expected or exacted of any man.

II

Section 6(j) must receive a practical and common sense interpretation.

It does not invoke the inexhaustible range of human imagination, circumstance or hypothesis. It requires interpretation and application in terms of the realities when the classification occurs.

The word "war" in the statute is associated with the individual's actual "religious training and belief" as applied to the actual conflict which confronts him, and not with the capabilities of his or some other person's imagination to conceive hypothetical conflicts.

Congress certainly did not intend to condition exemption solely upon the almost inconceivable instance of a man who could bring himself honestly to say that he would not join a war in the defense of his city if an enemy were at its gates seeking to sack it, or if an invading army were practicing extermination as it advanced.

In accordance with our nation's historical and constitutionally expressed exclusion of the free exercise of religion from any form of prohibition by the federal and state governments, Section 6(j) lays its foundation in "religious training and belief" and the consequent inviolability of individual conscience. That which the individual in the light of his religious training and belief interprets as God's will furnishes a fortress of conscience which government cannot assault or invade.

In *Holy Trinity Church* v. *United States,* 143 U.S. 457, the Supreme Court said (p. 465):

> "But beyond all these matters no purpose of action against religion can be imputed to any legislation, state or national, because this is a religious people. This is historically true. From the discovery of this continent to the present hour, there is a single voice making this affirmation."

In *Cantwell* v. *Connecticut,* 310 U. S. 296, the Supreme Court said (pp. 303-4):

> "Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law."

In *Girouard* v. *United States,* 328 U.S. 61, the Supreme Court said (p. 68):

> "The struggle for religious liberty has through the centuries been an effort to accommodate the demands of the State to the conscience of the individual. The victory for freedom of thought recorded in our Bill of Rights recognizes that in the domain of conscience there is a moral power higher than the State."

In *Williams* v. *United States,* 216 F. 2d 350, the Hearing Officer had reported that the registrant's claim of conscientious objection was simply the Bible's teachings "against murder, theft and other sinful things", "but they are entirely aside from any faith or belief in participation in carnal warfare". The registrant was indicted, convicted and sentenced to a two-year term. The United States Court of Appeals, Fifth Circuit, reversed and acquitted, saying (p. 352):

> "The registrant may have his own construction and meaning for the scriptures and is not bound by that of the hearing officer or of the courts. That goes to the essence of religious liberty. * * * Congress in its wisdom considered it more essential to respect a man's religious belief than to force him to serve in the armed forces. The draft boards and the Courts are bound to carry out that policy."

In *Davis* v. *Beason,* 133 U.S. 333, the Supreme Court said (p. 342):

> "With man's relations to his Maker and the obligations he may think they impose, and the manner in which an expression shall be made by him of his belief on those subjects, no interference can be permitted, provided always the laws of society, designed to secure its peace and prosperity, and the morals of its people, are not interfered with."

III

In Section 6(j) the words "in any form" relate back to "participation".

In *Sicurella* v. *United States,* 348 U.S. 385 (a Jehovah Witness case), the Supreme Court said (p. 390):

> "The test is not whether the registrant is opposed to all war, but whether he is opposed, on religious grounds, to *participation* in war."

In *Taffs* v. *United States,* 208 F. 2d 329, 331 (cert. den. 347 U.S. 928) a Jehovah's Witness, was denied classification as a conscientious objector "since appellant approved of and apparently would participate in theocratic wars, he was not opposed to 'participation in war in any form.' "

But the court held that Congress did not "concern itself with theocratic wars—that is, wars carried on by the immediate direction of God. The words, 'in any form,' obviously relate, not to 'war' but to 'participation in' war. War, generally speaking, has only one form, a clash of opposing forces. But a person's participation therein may be in a variety of forms."

This interpretation was repeated in like words in *United States* v. *Hartman,* 209 F. 2d 366, 371, and in *United States* v. *Close,* 215 F. 2d 439, 442.

Obviously, the Army predicated its decision in Negre's case on the error of relating the words "in any form" to the word "war", and thereby denied Negre's application because his religious belief did not exclude participation in a hypothetical future war, such as a direct attack on the United States, at a hypothetical future time.

By this error the Army changed the statutory word "war" into the plural and made it coextensive with all armed conflicts, of any nature whatsoever, which theory or hypothesis could conceive at a hypothetical future time.

Since it is settled that "freedom of conscience" "cannot be restricted by law" (*Cantwell* v. *Connecticut,* 310 U.S. 296, 304), a reading of Section 6(j) which would restrict the protection of conscience only when excluding participation in all hypothetical wars at all hypothetical future times, would so restrict the immunity of conscience as to entail the difference between the assurance of life and the hazard of death.

There is nothing to show that Congress had an intent so alien to our nation's basic principles. Nor can any such arbitrary and oppressive intent be presumed. Statutory language may be stretched to avoid discrimination in the enjoyment of First Amendment liberties, but language neither will nor can be stretched to create limitation or discrimination therein.

In *United States* v. *Seeger,* 380 U.S. 163, 183, the Supreme Court commented upon "the difficulties inherent in placing too narrow a construction on the provisions of Section 6(j)". In his concurring opinion Mr. Justice Douglas followed through by saying (p. 188):

> "If it is a *tour de force* so to hold, it is no more so than other instances where we have gone to extremes to construe an Act of Congress to save it from demise on constitutional grounds. In a more extreme case than the present one we said that the words of a statute may be strained 'in the candid service of avoiding a serious constitutional doubt.' *United States* v. *Rumely,* 345 U.S. 41, 47."

"In the candid service of avoiding a serious constitutional doubt," the Supreme Court said in *United States* v. *Rumely,* 345 U.S. 41, 47:

> "With a view to observing this principle of wisdom and duty, the Court very recently strained words more than they need be strained here. *United States* v. *C.I.O.,* 335 U.S. 106. The considerations which prevailed in that case should prevail in this."

See also:

> *Crowell* v. *Benson,* 285 U.S. 22, 62;
> *Ullman* v. *United States,* 350 U.S. 422, 433;
> *Ashwander* v. *TVA,* 297 U.S. 288, 341.

POINT TWO

In its essence, terms and effect, the Army's action was a restriction upon Negre's basic right of the free exercise of his religion as guaranteed by the First Amendment; and was also a violation of the prohibition in the Fifth Amendment against the deprivation of life, liberty and property without due process of law, since it was discrimination in denial of the equal protection of the laws.

I

By holding that Negre's claim to the status of a conscientious objector, derived as it expressly was from Roman Catholic training and belief, could not be honored because it did not exclude participation in a hypothetical war at a hypothetical future time, the Army was adopting an impermissible discriminatory test, attainable only by an absolute pacifist, who without physical resistance would accept martyrdom for himself, his neighbors and his country. Under the Army's decision, all persons failing such a test would be subject to combat service.

Ex vi termini such an interpretation and application of Section 6(j) constitute a gross discrimination in the right to the free exercise of religion, in the right to the acceptance of the mandates of conscience, and in the right to equality in the matters of due process and the equal protection of the laws.

What is more, such an interpretation and application plunge the Army and other arms of Government into "inquiries foreclosed to Government" (*United States* v. *See-*

ger, 380 U.S. 163, 184). It is no part of the business of Government to examine the rationality of a man's conscience, or to define or place limitations for it, or to discriminate between one man's conscience and religious belief and another's, or to differentiate in legal consequences because of such discrimination. Least of all are the Armed Forces competent or legalized so to do.

In *United States* v. *Seeger,* 326 F.2d 846, the United States Court of Appeals for the Second Circuit unanimously said (p. 851):

> "It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination."

The force of this language is emphasized by the fact that on appeal the Supreme Court avoided the constitutional dilemma by holding that in fact Seeger's objection fell within the exempting words permissibly expanded to avoid unconstitutional discriminations.

What has happened here is that the Army has done precisely what in the *Seeger* case the Court of Appeals held could not be done constitutionally, and what the Supreme Court, through liberal statutory interpretation, avoided confronting as a constitutional issue.

When a ruling which affects primary rights draws a distinction between classes, that distinction must be supported by a compelling Government interest. *Shapiro* v.

Thompson, 394 U.S. 618. The *Shapiro* case dealt with the right to receive state welfare grants; application of the rule established therein is patently no less appropriate to the more fundamental right of religious freedom in the instant case. Yet, as convincingly detailed in Judge Zirpoli's decision in *United States* v. *McFadden,* 309 F.Supp. 502 (appeal pending No. 422, October Term, 1970), neither manpower requirements, troop morale, administrative efficiency nor any other reason compel the Army to practice invidious discrimination against a man simply because his religious opposition may not extend to all conceivable wars other than the one by which he is directly confronted.

We respectfully submit, therefore, that Section 6(j) can and should have been interpreted to effectuate Negre's separation from the Army in view of the fact that he is conscientiously opposed to the particular war in which he was ordered directly to participate solely by reason of his "religious training and belief," which "does not include essentially political, sociological, or philosophical views, or a merely personal moral code."

II

If Section 6(j) cannot be so interpreted, then, we submit that the issue must be decided whether, quite apart from Section 6(j), the Free Exercise of Religious Clause affords constitutional exemption in the present case.

The Supreme Court has been steadfast and frequent in its insistence that Government must refrain from "aiding one religion", and that sectarian preferences are no part of the business of Government.

Participation in war is an inescapable subject matter for religion and for the human conscience which derives its content from religious training and belief. Of necessity, therefore, the Army, in basing eligibility for separation upon the extent to which Negre's conscience might or might not exclude participation in hypothetical wars at hypothetical future times, was invading a central area of religious belief; was entering upon forbidden inquiries in the field of conscience; and was favoring one religious position and its adherents and a particular conscience as against the religions and consciences of others.

POINT THREE

If the Army were correct in holding that Section 6(j) and its wording mandated denial of Negre's application for discharge as a conscientious objector, the section would in respect of such denial be unconstitutional as violative of the First and Fifth Amendments.

It would be discriminatory against the religious belief and conscience which he has a constitutional right freely to entertain and exercise; and for which he is entitled to due process of law and the equal protection of the laws.

I

We are not concerned with speculation as to the possible meanings of the terms "religion," "religious training and belief," or "conscience."

The Roman Catholic faith is a "religion" by any standards. There is no issue as to the reality of Negre's Roman Catholic "religious training and belief." There is no issue as to the reality and sincerity of his faith and conscientious objection based solely on Roman Catholic religion and teaching as he understands and practices it.

Nor is it claimed, or could be claimed, that there is any legitimate, much less compelling, state interest for denying to a Roman Catholic an exemption extended to members of other religious denominations. In fact, the state's interests will be best served by not involving the state in the age-old tragedies and disruptions of governmental preferences and immunities as between religious bodies or groups. In matters of religion the State is obligated by our Constitution to be in letter and spirit "*neutral.*"

Nor can there be any issue that participation in war's killing and maiming of human beings, and in war's inevitable infliction of starvation, disease and destruction of property and the essentials of civilization, is an inescapable concern and involvement of religion and of the individual conscience, which derives its content and dictate from religious training and belief. Indeed Section 6(j) is itself a clear recognition of that truism.

There can be no denial of the soundness, particularly in the field of religion, of the statements in *United States* v. *Seeger,* 326 F.2d 846, 851:

> "We find it unnecessary to determine whether an exemption for some or all conscientious objectors is a constitutional necessity, or is merely dependent upon the will of Congress. * * * For it now seems well-established that legislative power to deny a particular privilege altogether does not imply an equivalent power to grant such a privilege on unconstitutional conditions. See Speiser v. Randall, 357 U.S. 513, 78 S.Ct. 1332, 2 L.Ed.2d 1460 (1958). It could hardly be argued, for example, that the ability of Congress to deny an exemption to all conscientious objectors would permit Congress to limit that exemption to objectors of one particular religious denomination."

In *Speiser* v. *Randall,* 357 U.S. 513, a California statute granted certain tax exemptions to honorably discharged veterans, but it stipulated that such tax exemptions should not be granted to those who refused to subscribe to oaths that they did not advocate the overthrow of the Federal or State Government by force. The Supreme Court held that a discriminatory denial of tax exemption for engaging in certain speech is a limitation on free speech, and that

the procedure for determination imposed by the California statute denied due process. Said the Court, quoting from its prior decision in *Bailey* v. *Alabama*, 219 U.S. 219, 239:

> "It is apparent that a constitutional prohibition cannot be transgressed indirectly by the creation of a statutory presumption any more than it can be violated by direct enactment. The power to create presumptions is not a means of escape from constitutional restrictions."

So, likewise, the constitutional prohibition against impairing the free exercise of religion cannot be transgressed indirectly by the creation of a statutory exemption or immunity in favor of one religious belief any more than it can be violated by the direct enactment of such favor by prohibiting or restricting the free exercise of another religious belief.

II

There is, of course, an obvious difference between "*religious belief*" as a constitutional right and "*religious action*" as a constitutional right. Under the First Amendment the former is *absolute;* but the latter may be restricted or even prohibited to the extent that it constitutes a realistic danger to public safety or morals or the essential rights of others.

As said in *Abingdon School District* v. *Schempp*, 374 U.S. 203, 218, quoting from *Cantwell* v. *Connecticut*, 310 U.S. 296:

> "Thus the (First) Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be."

This constitutional difference between the absolute freedom of religious belief and the qualified freedom of religious action entails in its application a constitutional difference between *a state prohibition* of a religious practice and *a state command* to do an act contrary to a religious belief and the conscience which such belief activates.

In the present instance this difference is not one of words but of primary substance. Here the Government, in substance, is not prohibiting an affirmative act. Rather, by denying Negre's application and ordering his service in Vietnam, it has commanded an affirmative act,—an act which involved his personal participation in the killing and maiming of other human beings in a struggle which his conscience, as activated by his religious belief, could not accept as just.

If the Government can *command* such a complete contradiction of the individual's religious belief and conscience, the First Amendment's guarantee of freedom to exercise religious belief ceases to be "absolute" and its wording ceases to mean what it says.

We know of no exception to the consistent holdings of the courts that Government cannot command disobedience of religious belief and conscience, and this even though such belief may seem to others to be irrational or even abhorrent.

In *Board of Education* v. *Barnette,* 319 U.S. 624 (1943), the Court overruled its previous decision in *Minersville School District* v. *Gobitis,* 310 U.S. 586, and held (Judges Roberts and Reed dissenting) that a Virginia statute man-

dating the officers of the public schools to require all pupils under penalty of "insubordination" to salute the flag and pledge allegiance in the traditional attitude and words, violated the First and Fourteenth Amendments. The Court said, per Judge Jackson (pp. 641-2):

> "As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. * * *
>
> "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us."

In *Torcaso* v. *Watkins*, 367 U.S. 488 (1961), the Court held that a Maryland statute requiring a declaration of belief in the existence of God "as a qualification for any office of profit or trust in that State," was unconstitutional as violative of the First and Fourteenth Amendments. The opinion was written by Justice Black. Justices Frankfurter and Harlan concurred in result only. The Court reaffirmed the statement in the concurring opinion of Justice Frankfurter in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U.S. 203, 213, 232, that (pp. 493-4):

> " 'We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an 'established church.' * * * We renew our con-

viction that 'we have staked the very existence of our country on the faith that complete separation between the state and religion is best for the state and best for religion'."

In *Sherbert* v. *Verner,* 374 U.S. 398, a South Carolina Unemployment Compensation Act made a claimant ineligible for benefits if he had failed without good cause to accept available suitable work when offered to him. Sherbert was discharged by her employer because she refused to work on Saturday. Her religious belief as a Seventh Day Adventist forbad her to do so. Because of this belief she was unable to obtain other employment. The State Commission denied her application for unemployment benefits. The Supreme Court held (Justices Harlan and White dissenting) that the denial was the equivalent of a state mandate to forego, under penalty of the loss of unemployment benefits, what her religious conscience mandated her not to do. The Court said (p. 402):

> "The door of the Free Exercise Clause stands tightly closed against any governmental regulation of religious *beliefs* as such, *Cantwell* v. *Connecticut,* 310 U.S. 296, 303. Government may neither compel affirmation of a repugnant belief, *Torcaso* v. *Watkins,* 367 U.S. 488; nor penalize or discriminate against individuals or groups because they hold religious views abhorrent to the authorities, *Fowler* v. *Rhode Island,* 345 U.S. 67; nor employ the taxing power to inhibit the dissemination of particular religious views, *Murdock* v. *Pennsylvania,* 319 U.S. 105; *Follett* v. *McCormick,* 321 U.S. 573; cf. *Grosjean* v. *American Press Co.,* 297 U.S. 233."

To quote further (p. 404):

> "Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from

> the practice of her religion, but the pressure upon her to forego that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship."

In *In re Jenison*, 120 N.W.2d 515, judgment vacated 375 U.S. 14, Mrs. Jenison was summoned to serve as a juror and was selected to sit in a civil case. When the clerk was about to administer the oath, she refused because: "It's against my Bible teaching. My Bible tells me 'Judge not, so you will not be judged.' " The trial court thereupon sentenced her to jail for thirty days for contempt. The Supreme Court of Minnesota unanimously affirmed (120 N.W.2d 515). This Court vacated the judgment of contempt with the following memorandum (375 U.S. 14):

> "The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the Supreme Court of Minnesota for further consideration in light of *Sherbert* v. *Verner*, 374 U.S. 398."

In *Sheldon* v. *Fannin*, 221 F.Supp. 766, students had been suspended from a public school for "insubordination" because of their refusal to stand for the singing of the National Anthem as required by a regulation of the Arizona State school authorities. The students were members of the Jehovah's Witnesses. They claimed that their religious faith mandated their refusal to stand, a faith based on the refusal of the three Hebrew children Shadrach, Meshach

and Abednego to bow down at the sound of musical instruments playing patriotic-religious music throughout the land as ordered by King Nebuchadnezzar of ancient Babylon.

The District Court held that the command by the state school authorities to stand, under penalty of suspension and expulsion, was an unconstitutional prohibition of the students' free exercise of religious belief, "no matter how unfounded or even ludicrous the professed belief may seem to others" (p. 775).

To quote (pp. 774, 775):

> "In considering this contention, it should be observed that lack of violation of the 'establishment clause' does not *ipso facto* preclude violation of the 'free-exercise clause.' For the former looks to the majority's concept of the term religion, the latter the minority's. * * * While implicitly demanding that all freedom of expression be exercised reasonably under the circumstances, the Constitution fortunately does not require that the beliefs or thoughts expressed be reasonable, or wise, or even sensible. The First Amendment thus guarantees to the plaintiffs the right to claim that their objection to standing is based upon religious belief, and the sincerity or reasonableness of this claim may not be examined by this or any other Court."

In *In re Estate of Brooks*, 32 Ill.2d 361 (205 N.E.2d 434) (1965), Mrs. Brooks, who, with her husband and adult children, were Jehovah Witnesses, and opposed, as a matter of religious belief, to blood transfusion, was dying in a hospital unless, in the opinion of the doctors, she received blood transfusion. The hospital and the doctors had been

told by her that she refused blood transfusion. Nevertheless, when she was approaching coma, the probate court appointed for Mrs. Brooks a conservator who thereupon consented in her name. The Supreme Court of Illinois held that the order was an unconstitutional state mandate violative of her free exercise of religious belief, saying (205 N.E.2d 435, 442):

> "What has happened here involves a judicial attempt to decide what course of action is best for a particular individual, notwithstanding that individual's contrary views based upon religious convictions. Such action cannot be constitutionally countenanced."

In *Hardwick* v. *Board of School Trustees*, 205 P.Rep. 49, 56 (24 Cal.App. 696) (1921), the California District Court of Appeals, and the California Supreme Court (sitting *en banc*), both held unanimously that a school board could not constitutionally compel children to dance in couples (boys and girls) when the religious beliefs of their parents forbad such style of dancing. After the court had held that such belief, if held by a religious organization was constitutionally inviolate, the court went on to say (pp. 52-3):

> "But the principles above stated are not alone applicable to religious organizations or to persons actively affiliated with such organizations. They apply as well to any person having religious convictions irrespective of whether he is a member of any church or other religious society. Manifestly, a person may have religious views or principles of his own, different, perhaps, on doctrinal matters, from those of any church organization or any other person. He may have a way, peculiar to himself, of worshipping the Supreme Being, and there is no logical ground for holding that in thus

worshipping his Maker, he is not equally entitled with every other person or church society to the protection of the constitutional guaranties to which we have above adverted."

III

For like reasons, the Army's interpretation of Section 6(j) would be grossly discriminatory against the religious belief and conscience which Negre has a constitutional right freely to entertain and exercise, and for which he is entitled to due process and the equal protection of the laws.

Whatever right Government might have, when faced with dire national peril, to subject to military service all able-bodied men, irrespective of religious belief or conscience, such authority cannot discriminate in the common burden or deny the equal protection of the laws by exempting members of one religious faith and not others.

By any such discrimination Congress would deny to the unfavored religious group and its members due process, the equal protection of the laws and the free exercise of religious belief. In addition, Congress would thereby be effecting a government favored establishment of religion.

If the First Amendment protects citizens in their conscientous refusal to work on Saturday, to stand up for the singing of the National Anthem, to repeat the pledge of allegiance to the flag, to dance in co-educational couples, or to affirm their belief in God, how much more important it is that the First Amendment should protect them in their conscientious refusal to take human life.

This is not a so-called "selective objection to war." Negre's objection to any form of participation in the Vietnam conflict was not merely held "with the strength of more traditional religious convictions". His decision was in fact *dictated,* once his moral judgment as to the justness of the relevant war was made, by the doctrine of a "traditional" religion—his Roman Catholic faith.

Rather, therefore, the Army's interpretation of Section 6(j) was *a selective exemption* from the burden and hazard of military service and from the obligation which military service imposes to destroy other human beings. It is a contradiction and nullification of the victory for liberty of conscience, speech, due process and equality in protection by the law of the land which our Constitution has wrung from the strife of human history. Such an interpretation mocks the hopes and aspirations of the countless individuals, including Negre's own parents, who have come to this nation seeking the freedoms which our law provides. For, as noted in *United States* v. *McFadden,* 309 F.Supp. 502, 506:

> "[A]lthough our history is not free from religious intolerance and persecution, it has always been the ideal of our forefathers to create a country where ... '[t]he liberty enjoyed by the people of these States of worshipping Almighty God agreeably to their consciences, is not only among the choicest of their blessings, but also of their rights.' "

Conclusion

The disposition by the courts below should be reversed, and the relief sought should be granted.

Respectfully submitted,

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